Odebrecht Contractors of California, Inc. *and* International Union of Operating Engineers, Local 12, AFL–CIO. Cases 31–CA–21966 and 31–CA–21967

September 19, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 17, 1996, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Union filed a brief in opposition.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set out in full below.[2]

The judge stated that the principal issue here is ''whether or not [the] Respondent was free to unilaterally change its rotating shift system which resulted in the layoff of the 79 employees listed in Appendix A'' of the judge's decision. Although the judge found, in effect, that the Respondent was free to unilaterally change its rotating shift system, he further found that the Respondent was not free to unilaterally lay off the 79 employees without timely notifying the Union and bargaining over that matter. Accordingly, the judge concluded that the Respondent violated Section 8(a)(5) by unilaterally laying off the 79 employees. In reaching this conclusion, the judge reasoned that the Respondent's failure to notify the Union of the layoffs deprived the Union of an opportunity to bargain over ''the procedures to be followed in layoffs, the recall rights of employees who were to be laid off and the effects that such a layoff would have on those employees.'' Relying, inter alia, on *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988), and *Plastonics, Inc.*, 312 NLRB 1045 (1993), the judge found that the appropriate remedy for this violation required the reinstatement of the laid-off employees and the payment of full backpay to them, plus interest, for the duration of the layoffs.

The Respondent excepts, inter alia, to the judge's finding that reinstatement with full backpay for the duration of the layoffs is the appropriate remedy here. In this regard, the Respondent contends that since the decision to reduce the number of shifts was not amenable to resolution through collective bargaining, ''the decision to conduct the layoff was not a mandatory subject to [sic] bargaining,'' and, therefore, the Respondent was obligated to bargain only over the effects of that decision, not the decision itself. Accordingly, the Respondent asserts that only a remedy appropriate for an effects bargaining violation, analogous to that set out in *Transmarine Navigation Corp.*,[3] is warranted here.

For the reasons set forth below, we find that the Respondent's failure in this case to timely notify and bargain with the Union over its layoff of the 79 unit employees is an effects bargaining violation. Accordingly, we shall order the Respondent to remedy this violation by making whole the laid-off employees in the manner set out in *Transmarine Navigation*, supra.

The facts have been fully set out by the judge. In brief, the Respondent is a general contractor currently engaged in constructing a large earthen dam, known as the Seven Oaks Dam, near Highland, California. The Union was certified on February 7, 1995, as the 9(a) collective-bargaining representative of the Respondent's employees working on the Seven Oaks Dam project who perform work traditionally performed by operating engineers, i.e., the operation and maintenance of heavy construction equipment.

After the Union's certification, the parties engaged in collective bargaining for over a year. The principal obstacle to reaching an agreement was the Respondent's method of computing wages under its ''Rolling Four Ten'' shift procedure, whereby each of four shifts worked 10 hours a day during a 4-day week. The Respondent paid the employees at the straight time rate for each of the hours worked over 8 hours a day. The Union contended throughout negotiations that under its policies and California law, the employees should be paid time and a half for each hour worked over 8 hours a day.

On April 2, 1996,[4] Richard Soares, the Respondent's project manager, sent a letter to the Union in which he stated that ''[e]ffective April 15, 1996, a five (5) day, eight (8) hours/day work week will be implemented for both day and night shifts . . . in lieu of the *Rolling*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] For the reasons explained elsewhere in this decision, we shall modify the judge's recommended Order by deleting the expunction provision from the recommended Order and by substituting for the judge's bargaining order a provision that requires the Respondent to bargain with the Union over the effects of its decision to change its shift system, including the layoff of unit employees. Accordingly, we shall amend the judge's remedy by substituting a make-whole provision appropriate to an effects bargaining violation, i.e., one analogous to that set out in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), in place of the reinstatement and make-whole requirements set out in the judge's remedy.

[3] 170 NLRB 389 (1968). This remedy is intended to compensate for the loss of bargaining leverage that a union might have possessed had bargaining occurred before the action at issue was taken. See, e.g., *Stevens Pontiac-GMC*, 295 NLRB 599, 602-603 (1989).

[4] All dates hereafter refer to 1996 unless otherwise stated.

Four Ten shifts.''[5] On April 9, however, 6 days before the scheduled shift change, the Respondent began a major reduction in force that included the layoff of approximately half of the 79 employees ultimately laid off. On April 12, William Waggoner, the Union's chief negotiator, called John Bechard, the Respondent's business manager, and complained that the Respondent was firing people discriminatorily and that there needed to be a meeting right away to address this situation. Bechard replied that the Respondent was reducing its work force by 50 percent and that the selections were based on performance and supervisory evaluations. It is undisputed that the Respondent laid off 79 employees as a result of its decision to change its rotating shift system.

Based primarily on Bechard's testimony that the reduction in force had begun on April 9, 3 days before Waggoner's April 12 phone call to Bechard and 6 days prior to the announced April 15 schedule change, the judge found that the Respondent, by presenting the Union with a fait accompli, failed to bargain over the decision to lay off the employees and the effects of that decision. Accordingly, as explained above, the judge ordered the Respondent to reinstate the laid-off employees and to make them whole by paying them backpay for the duration of the layoffs.

We find that the judge, in providing a full backpay and reinstatement remedy, erred by failing to consider that the layoff decision was itself an effect of another decision, i.e., the Respondent's decision to change its rotating shift system, which was neither alleged nor found to be a mandatory subject of bargaining. In this regard, the complaint alleged that the Respondent violated Section 8(a)(5) solely on the ground that ''Respondent has failed and refused to bargain collectively with the Union as the exclusive collective-bargaining representative of the [unit] employees . . . in that Respondent unilaterally laid of 128 [sic] employees without first giving notice to or bargaining with the Union.'' At the hearing in this case and in her posthearing brief to the judge, counsel for the General Counsel clearly explained that this 8(a)(5) complaint allegation alleged only an effects bargaining violation.[6]

Further, we observe that the General Counsel's allegation that the Respondent was obligated to bargain over the layoffs as an effect of a decision that was not itself alleged to be subject to bargaining, i.e., its decision to change its rotating shift system, is consistent with Board doctrine in such cases. In *Miami Rivet of Puerto Rico*, 318 NLRB 769 (1995), for example, the Board found that the respondent was obligated to provide the union the precise timetable for its layoff of unit employees that followed its decision to partially close its facility. The Board explained that

> [t]his request is plainly relevant to effects bargaining. Those effects included the layoff, patently itself a mandatory bargaining subject. That is so even where, as here, the layoff is an effect of an entrepreneurial decision that is not alleged to be subject to bargaining.[7]

Accordingly, we find that the Respondent has violated Section 8(a)(5) by failing to bargain with the Union over the effects of its decision to change its rotating shift system, including the layoff of the 79 employees listed in Appendix A of the judge's decision.

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully refused to bargain with the Union about the effects of its decision to change its rotating shift system, including its layoff of 79 unit employees, we shall accompany our Order to bargain with a limited backpay requirement designed both to make employees whole for losses, if any, suffered as a result of the violation, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so in this case by requiring the Respondent to pay backpay to the 79 laid-off employees in a manner analogous to that required in *Transmarine Navigation Corp.*, supra.

Thus, the Respondent shall pay employees backpay at the rate of their normal wages when last in the Respondent's employ, from 5 days after the Board's decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union about those subjects pertaining to the effects on its employees resulting from its decision to change its shift system; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of our decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he would have

[5] The full text of the letter is set out in sec. II,D, of the judge's decision.

[6] In her opening statement at the hearing, counsel for the General Counsel stated that ''[t]he General Counsel found that [the layoff of the 79 employees in April 1996] was an economic layoff; *hence, the respondent's obligation was limited to effects bargaining.*'' (Tr. 9:22–24.) (Emphasis added.)

[7] Id. at 771. We agree with the Board's statement in *Miami Rivet of Puerto Rico*, supra, that a layoff is a ''mandatory bargaining subject'' and specifically disavow the judge's statement, at fn. 6 of his decision, that the Board ''has backed away from'' its view that the layoff of employees ''falls within the mandatory bargaining arena.''

earned as wages from the date on which he was laid off to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Odebrecht Contractors of California, Inc., Highland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to file decertification petitions with the Board.

(b) Telling employees that the rights guaranteed them by Section 7 of the Act are meaningless and suggesting that the exercise of those rights will result in employees getting into trouble with the Respondent.

(c) Failing to bargain with the Union over the effects of its decision to change its rotating shift system, including the layoff of the 79 employees listed in Appendix A of the judge's decision.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union over the effects of its decision to change its rotating shift system, including the layoff of the 79 employees listed in Appendix A of the judge's decision.

(b) Pay the 79 employees who were laid off as a result of its decision to change its rotating shift system backpay as set forth in the amended remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office in Highland, California, and at its jobsites in San Bernadino County, California, copies of the attached notice marked ''Appendix B.''[8] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

MEMBER FOX, concurring.

I agree, for the reasons stated by the judge as modified or clarified by my colleagues' opinion, that the Respondent violated the Act in all the respects reflected in our order. In view of the fact that the General Counsel alleged that the Respondent's obligation to bargain over the layoffs was merely an ''effects bargaining'' obligation and litigated the Respondent's alleged refusal to bargain on the ''effects bargaining'' theory, I agree that a *Transmarine* remedy is appropriate. Given the General Counsel's exclusive authority under Section 3(d) of the Act to draft the complaint, we have no basis for passing on whether the General Counsel should have alleged either that the Respondent's related unilateral decision to alter its shift system was unlawful or that the obligation to bargain over the layoffs stood on its own. Compare *Fast Food Merchandisers*, 291 NLRB 897, 903–904 (1988) (Member Cracraft, dissenting). I therefore do not pass on whether, had the General Counsel litigated the violations in this case differently, *Miami Rivet of Puerto Rico*, 318 NLRB 769, 771–772 (1995), would be dispositive of the remedial issue.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employees to file decertification petitions with the Board.

WE WILL NOT tell employees that the rights guaranteed them by Section 7 of the Act are meaningless, or suggest to them that the exercise of those rights will result in employees getting into trouble with us.

WE WILL NOT fail to bargain with the International Union of Operating Engineers, Local 12, AFL-CIO, over the effects of our decision to change the rotating shift system, including the layoff of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain with International Union of Operating Engineers, Local 12, AFL–CIO over the effects of our decision to change our rotating shift system, including the layoff of unit employees

WE WILL pay the 79 employees, who were laid off as a result of the April 15, 1996 shift change, backpay as set forth in the amended remedy section of this decision.

ODEBRECHT CONTRACTORS OF CALIFORNIA, INC.

Alice Joyce Garfield, Esq., for the General Counsel.
Franklin E. Wright, Esq. (Winstead, Sechrest & Minick), of Dallas, Texas, for the Respondent.
David P. Koppelman, Esq., of Pasadena, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Los Angeles, California, on August 12, 1996.[1] on a complaint issued by the Regional Director for Region 31 of the National Labor Relations Board on June 11. It is based on unfair labor practice charges filed April 17 by International Union of Operating Engineers, Local 12, AFL–CIO (the Union). The complaint alleges that Odebrecht Contractors of California, Inc. (Respondent) has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Issues

The principal issue presented by the consolidated complaint is whether or not Respondent was free to unilaterally change its rotating shift system which resulted in the layoff of the 79 employees listed in Appendix A. That conduct is said to be violative of Section 8(a)(5). Subsidiary to that issue are some contentions that Respondent interfered with or coerced employees with respect to their Section 7 rights. Specifically, the complaint, as amended on the record, asserts that Respondent solicited an employee to take steps to decertify the Union and also threatened to take some sort of negative personnel action against employees who were sympathetic to the Union. The latter allegations supposedly constitute violations of Section 8(a)(1).

All parties have filed briefs which have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, is a general contractor principally engaged in civil construction. The project in question is a large earthen dam located near Highland, California, in San Bernardino County known as the Seven Oaks Dam. It admits that during the past 12 months it has purchased and received from sources outside the State goods and services valued in excess of $50,000. Accordingly, Respondent admits it is, and I find it to be, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits the Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Certification; Early Bargaining*

Respondent admits in its answer, that the Union, after an NLRB election, was certified on February 7, 1995, as the 9(a) collective-bargaining representative of those of its employees who are engaged in work traditionally performed by operating engineers. In general, that work involves the operation and maintenance of heavy construction equipment. It is unnecessary for our purposes to explicate the entire range of such work. It is adequately described in the certification quoted in the complaint. The election was conducted among such employees who were working at Respondent's Seven Oaks Dam project.[2]

After the certification, the parties engaged in collective bargaining for well over a year. The principal barrier to reaching an agreement was a fundamental difference respecting the manner in which Respondent operated its shifts. In general, Respondent utilized a shift procedure commonly

[1] All dates are 1996 unless otherwise indicated.

[2] At the time of the hearing, August 1996, the project had been underway for about 2 years. It will be approximately 2 more years before it is completed. In addition to the persons involved in the elections, Respondent employed other construction crafts as well. These employees were represented, on a prehire basis under Sec. 8(f) of the Act, by most of the traditional building and construction trades unions under an agreement known as the Project Labor Agreement, signed on April 27, 1994, by several traditional AFL–CIO construction unions, the District Council of Carpenters, Plasterers and Cement Masons Local 97, and Laborers Local 783, as well as Teamsters Local 166. The Teamsters Local apparently had taken on the responsibility of providing persons skilled in the operating engineers craft, but had no interest in representing them.

called ''Rolling Four Tens,'' meaning that each of four shifts of employees worked 10 hours per day, rather than 8, but only a 4-day week, though work was performed 7 days a week. Respondent paid these employees the straight time rate, rather than overtime, for each of the hours exceeding 8 in a day. The Union asserted throughout the negotiations that any work over 8 hours per day should be paid time and a half under its policies and moreover, Respondent's practice contravened California law. The wage-hour laws of that State are more liberal than the Federal Wage-Hour law which requires overtime pay only after the employee's work exceeds 40 hours per week.

Respondent insisted on maintaining the overtime situation it had established, asserting both that Federal law applied and that exceptions to the California rules could be made where a 4–10s schedule had been established. The Union eventually filed a lawsuit over Respondent's overtime practices; it was unresolved at the time of this hearing. Moreover, Respondent demanded that any collective-bargaining contract which it signed include a ''management rights'' clause permitting it to set manning levels as it saw fit.[3] That became a problem as Union Business Manager and Chief Negotiator William Waggoner has firmly opposed the inclusion of management-rights clauses wherever he could. Indeed, negotiations stalled on those points, despite numerous sessions in both 1995 and 1996.

B. *Osborn; Solicitation of Decertification Petition*

In December 1995, equipment operator Mark Osborn had a conversation with Respondent's business manager, John Bechard, on the steps to the office. Osborn initially inquired about whether Respondent would continue to sponsor a baseball team. As he turned to go, he says he asked Bechard:

> ''[B]y the way, John, how's the Union negotiations going?'' And he said, ''They have broken off.'' And I told him, I said, ''That's too bad because I need benefits for my family.'' And then, Mr. Bechard made the comment that the company would be prepared to offer a ''very attractive package.'' I said, ''Well, how would that be done?'' He said that an employee would have to circulate a petition to decertify the Union, and he asked me if I would be interested in doing this. I said, ''Well, I don't know the laws or the procedure. How is this done?'' He said, ''You would have to be in touch with the NLRB. They would guide you through it and that the petition would have to have 30% of the employees doing operating engineer work. And then a vote would be taken, and you would have to have 50, plus one.''
>
> Then I asked him to explain a little bit about the benefit package that he was referring to. He said it would ''probably cost not more than about $3 an hour.'' And then he stopped, and said, ''I can't say anymore because the Union could sue CBPO[4] for unfair labor practices.'' I said, ''Well, John, how the hell can I take this to the employees if I can't answer the questions?'' Then I left.
>
> [Edited for punctuation.]

About 3 weeks later, again near the office steps, Osborn and Bechard spoke a second time. Osborn's testimony:

> Q. [BY MS. GARFIELD] And can you tell us please, again, in as detailed a fashion as you are able to, who said what?
>
> A. Well, as I was coming out, John was in a hurry, and he come by and said have you thought anymore about our last conversation? He said the petition has got to be done by January 26th.
>
> Q. Who said that?
>
> A. Mr. Bechard. [. . .] I said, ''John . . . .'' I said, ''I'm a Union member. Jim Fox,'' who is the superintendent, ''knows that; the employees know it.'' I said, ''I'm really not interested.'' [. . .] That was basically about it.
>
> [Edited for punctuation and continuity.]

Respondent offered no rebuttal to Osborn's testimony.

The Board has long held that an employer may not, without running afoul of Section 8(a)(1), solicit employees to file decertification petitions. See *Wahoo Packing Co*., 161 NLRB 174 (1966); *Manna Pro Partners*, 304 NLRB 782, 790 (1991), affd. 986 F.2d 1346 (10th Cir. 1993). The solicitation can take many forms, including the one seen here, a promise that Respondent has ''a very attractive package'' to offer. While vague, it is nonetheless a promise which at the very least would provide benefits no worse than those already obtained by the Union. *Dayton Blueprint Co*., 193 NLRB 1000, 1107 (1971); *Fabric Warehouse*, 294 NLRB 189, 191 (1989); *Ron Tirapeli Ford*, 304 NLRB 576, 578 (1991), affd. in pertinent part 987 F.2d 433 (7th Cir. 1993). There is no significant difference between those cases and this one. Accordingly, I find that Bechard's solicitation here violated Section 8(a)(1).

C. *Martin; Unspecified Reprisal for Union Activity*

Paragraph 10(b) of the complaint assets that ''on or about March 15, 1996, [Respondent's plant supervisor] Dan Lincoln threatened to take unspecified action against employees sympathetic to the Union.'' That paragraph is latently ambiguous and resulted in my hearing some testimony which counsel for the General Counsel conceded was not contemplated by the complaint. She specified, and her brief supports it, that her intention was to focus on a conversation between Bill Martin and Lincoln relating to a remark referencing employee rights set forth in an official NLRB notice announcing that an election petition had been filed. It is not clear from the record exactly what Martin's usual job is, but in March he was working in the permanent plant warehouse, having been assigned there on light duty due to a back problem.

The incident on which the General Counsel relies in support of the allegation is Lincoln's retort to Martin's remark that employees had rights, pointing to a newly posted NLRB notice which described those rights. According to Martin, it occurred in the afternoon of the same day he had been hand-

[3] The Project Labor Agreement permitted the Rolling Four Tens procedure and also contained a management-rights clause satisfactory to Respondent.

[4] The parties have stipulated that CBPO is a previous name of Respondent; many of the witnesses referred to Respondent by that name.

ing out union flyers with some union officials in the parking lot, believed to be March 9. He testified:

> Q. [BY MS. GARFIELD] Now, later that day, that same day, did you have a conversation with Mr. Lincoln?
>
> A. Yes, I did.
>
> Q. Approximately when?
>
> A. It would have been after lunch.
>
> Q. And can you tell us please where that conversation took place?
>
> A. Where I working behind the counter of the toolroom handing out tools.
>
> Q. Can you tell us please in as detailed fashion as you can what you said and what Mr. Lincoln said?
>
> A. He spoke first. ''Give me a little bit of money now, and I'll give you a lot of money later.'' I laughed, and I said, ''Mr. Lincoln—'' I pointed to a poster with my pencil and said, ''We have rights. It's not fair as far as how you are treating me and some other people, these are the rights.'' He turned and walked two steps to me, pointed at me and said, ''Martin, I thought you were smarter than that.'' He turned and walked away.
>
> . . .
>
> Q. Okay. When Mr. Lincoln said, ''Give me a little, I'll give you a lot,'' do you know what he was referring to?
>
> A. Uh, exactly what he thought, no.
>
> Q. Had you heard him make that comment before?
>
> A. Yes.
>
> Q. And when he had made it before, what was he referring to?
>
> A. We were talking about a union. We were discussing union matters, or generally to the point, union matters. And then he would make this statement, ''Give me a little money now, give you a lot later,'' or ''Give me money now, I'll give you some later.'' It was a little different each time, but it was the same—like a poem.
>
> Q. You testified that you pointed to a poster that said employees have rights, correct?
>
> A. Yes.
>
> Q. I would like to show you what has been marked as GC–4. [NLRB form 5492 (8–95).][5] Can you identify that Mr. Martin, please?
>
> A. Yes. That's what was on the back of the door?
>
> Q. That is what you pointed to during this conversation with Mr. Lincoln?
>
> A. Right.
>
> [Edited for punctuation and continuity.]

Lincoln did not directly refute Martin's testimony. He first spoke of the amount of hourly wage each of the employees received, plus the fringe benefit allowance. He pointed out that each employee was then receiving $31 per hour, including $9 for fringe benefits. He then testified:

> Q. [BY MR. WRIGHT] Did you ever make the comment ''give me a little bit of money now, I will give you little bit later,'' referring to what the union's usual procedure was? Do you recall ''give me little bit of money now and I will give you a lot later'' as the way the union operated? Do you recall making any statement like that?
>
> A. No.
>
> JUDGE KENNEDY: Do you [not] recall it, or not doing it, or . . . . Are you saying you did not do it?
>
> THE WITNESS: No. I have no recollection of any conversation along that line.
>
> [Edited for punctuation, continuity and transcript correction.]

Martin did not include any reference to the incident in the affidavit which he gave the Board agent during the investigation of the case. He explained that the Board agent would not let him use the personal notes which he says he had made contemporaneously to help him with the affidavit. On redirect, to counter the credibility problem created by the omission, he did present the notes; these had been given to the General Counsel only the day before the hearing. They do seem to qualify as a prior consistent statement, yet I am not wholly convinced. It seems most odd that a Board investigator would deny a witness the opportunity to review near-contemporaneous and, therefore, more likely accurate, records. Wouldn't the investigator also want the notes placed in the investigative file? Why, then, didn't they come to the General Counsel's attention sooner than they did?

That circumstance lessens the probability of Martin's probity. Yet, Lincoln could not deny it either, only weakly saying he couldn't recall making such a statement. Even so, Lincoln admitted to an unusual curiosity about Martin's union doings. He asked what Martin had been doing with the group by the gate, and when Martin responded that he was talking with the union business representative, admits he asked Martin why, something that was none of his business, even if done noncoercively. He then said Martin replied they were ''working on possibly voting the union in.'' That, too, is an odd statement, since the Union had been voted in a year before and continued to hold its Section 9(a) status. If anything, they would have been discussing the decertification effort, not an election, since no election had yet been ordered. More likely the Union was considering revitalizing the movement either because of the decertification petition or in order to reestablish its bargaining strength. Either way, Lincoln's testimony cannot be seen as likely to be an accurate recitation of what Martin had told him.

Accordingly, while I recognize that Martin's own credibility is weak, Lincoln's failure to deny and his inability to place the conversation in a credible context renders it even less believable. Therefore, I credit Martin's version. Thus, as it stands, Martin has testified that Lincoln, after seeing Martin fortify his right to engage in union activity by pointing to an official Board notice, denigrated that right by saying, ''Martin, I thought you were smarter than that.''

I find that, in context, Lincoln's remark was intended to be contemptuous of Martin's right to engage in protected union activity and to suggest that Martin had taken a position which was so unwise as to risk being seen in a negative light

[5] An employee had filed a decertification petition shortly before. The notice to which Martin referred is routinely sent to an employer on the filing of a representation petition. It describes various rights and procedures under both Secs. 7 and 9 of the Act. The Board asks employers to post the notice to educate both the employer and the employees about their responsibilities and rights during the preelection period.

not only by him but by Respondent's management as well. Moreover, the remark not only hinted at retaliation, it aimed to undermine the protective mantle of the Act, for he was belittling the statutory rights described in the official Board notice. In a very real sense Lincoln was declaring the rights to be meaningless, that Martin was pursuing a futility which would only cause him some sort of loss. In that circumstance, I find the remark to be aimed at coercing Martin from engaging in protected Section 7 activity, and therefore a violation of Section 8(a)(1) as alleged by the General Counsel.

D. *The Layoffs as a Unilateral Act*

Sometime in late March or early April 1996, Respondent concluded that the Rolling Four Ten schedule was not working out. The date of the decision to change scheduling programs is not clear from the record. Nonetheless, on April 2, Respondent's project manager, Richard Soares, wrote a letter to the Union. For reasons which are somewhat obscure, the letter was sent to the Union's suboffice in Colton, rather than its main office in Pasadena. In addition, it was sent to the attention of Robert (Bobby) Dye, an assistant business agent. Dye had been present during the 1995 negotiation sessions, but had not participated in the 1996 meetings. Furthermore, Dye is stationed at the Union's suboffice in Indio, not Colton. It would seem that the letter was almost designed to go awry.

Respondent's business manager, John Bechard, explained that the letter was sent under his direction. He knew the Union's chief negotiator was Waggoner and that he was the person responsible for scheduling negotiations. Even so, he sent the letter to a location and to a person which would require union officials to forward it to their headquarters office, at least once if not twice.

The letter, in evidence as General Counsel's Exhibit 2, was received by the Colton office on April 4 and telefaxed to the Pasadena headquarters that day. In its entirety it reads:

> This letter is to inform you of a change in the hours of work at the Seven Oaks Dam project. Effective April 15, 1996, a five (5) day, eight (8) hours/day work week will be implemented for both day and night shifts. Overtime on each day may range up to two (2) additional hours per shift and on the sixth and seventh day as dictated by the project schedule and requirements. This schedule will be in lieu of the *Rolling Four Ten* shifts. [Emphasis added.]

Waggoner testified that he did not see the letter until April 15, explaining that he was out of town during most of that time. Bechard says he had two telephone conversations with Waggoner between April 4 and 15. He asserts that the first occurred on April 4 and the second on April 12.

Waggoner says that he first saw the letter on April 15 when Staff Attorney Koppelman showed it to him. He says he then called Bechard. Waggoner testified:

> I advised Mr. Bechard that due to the fact that they had eliminated the so called Rolling Four Tens that we should probably arrange for a negotiation. He said, ''Well, I'd like to have permission to go ahead and eliminate two of these shifts.'' He said all of the other trades on the job, they had agreed to that. I said, ''Well, I don't want to agree to that on the phone, and we should probably negotiate that. And I'd like to do it at the bargaining table.''

Waggoner went on to say that Bechard advised that negotiations could not begin until Soares had returned from abroad. Waggoner further asserts that Bechard told him nothing about layoffs affecting the Operating Engineers, except the reference to eliminating the shifts. Waggoner did admit that he knew the elimination of two shifts would require the layoff of a large number of Operating Engineers.

Bechard denies ever seeking Waggoner's permission to eliminate any shifts. He says that on April 4, Waggoner called him to say that since the company had changed shifts, he was ready to sign an agreement and recommended that a meeting be called. Bechard says he told Waggoner that Soares was out of the country and would not return until May 6.

Bechard says that on April 12, Waggoner called again. During that conversation Waggoner complained that Respondent was firing people discriminatorily and he needed to have a meeting right away to address the situation, saying that the situation was too important to jeopardize a $300 million project even if Soares was still out of town. Bechard replied that the company was doing a reduction in force and the selections were based on performance and supervisory evaluations, since the reduction was to be 50 percent.

Bechard's testimony here acknowledges that Respondent had in fact begun a major reduction in force, i.e., the layoff of approximately half of the 79 employees ultimately let go. There is no dispute that the layoff procedure commenced on April 9, 3 days before Bechard says Waggoner called the second time. Furthermore, that date precedes the date of the shift change by almost a week. Respondent's April 2 letter had announced that the shift change would not begin until April 15.

One could at this point observe that there is a credibility discrepancy between the testimony given by Waggoner and that given by Bechard. However, I do not deem it necessary. It is clear to me that Bechard's testimony constitutes an admission that Respondent violated Section 8(a)(5) of the Act. It is true that the record contains additional evidence relating to the question of whether or not the Union waived its right to bargain over the nature of the layoff, and I shall discuss that question below. However, the short answer to that issue is that Respondent did not even keep its word with respect to the date the change was to be made. In reality Respondent presented the Union with no opportunity to bargain; instead it presented it with a fait accompli.

Specifically, the Union was the Section 9(a) representative of the operating engineers employed by Respondent. That status resulted from a Board certification which had issued a little over a year previously. At no time during the period between the issuance of the certification and the decision to lay off the employees has Respondent had reason to doubt the Union's representative status. Indeed, although bargaining in 1996 had been temporarily halted due to an apparent impasse, no party had reason to think that bargaining was over. Certainly the certification, though over a year old, had barred the employer from making unilateral changes. See *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in perti-

nent part 912 F.2d 854 (6th Cir. 1990). In fact, Respondent, by virtue of the April 2 letter was implicitly continuing to recognize its duty to advise the Union of pending matters likely to affect wages, hours, and terms and conditions of employment.

We start first with a clear point of law: A layoff of employees effects a material, substantial, and significant change in the affected employees' working conditions. *NLRB v. Katz*, 369 U.S. 736, 747 (1962), *Warehouse & Office Workers Local 512 v. NLRB*, 795 F.2d 705, 710–711 (9th Cir. 1986); *Rangeaire Co.*, 309 NLRB 1043, 1047 (1992). Accordingly, in a layoff scenario certain requirements must be met in order to observe the good-faith bargaining obligation of Section 8(a)(5) and Section 8(d). Thus, even if it may be argued successfully that the decision to make an economic layoff falls within the employer's exclusive purview,[6] the rules under which layoffs are to be made, are clearly a mandatory subject of bargaining. Where the rules have not yet been established, an employer who wishes to make changes which will result in a layoff must at the very least timely notify the Union that a layoff decision has been made and give the Union the opportunity to bargain about how it will change the circumstances of the affected employees. Indeed, the Board has specifically held, where the parties have yet to establish their rules regarding how layoffs are to be handled, that they must bargain over those rules before implementing the layoff. Specifically, in *Clements Wire*, 257 NLRB 1058, 1059 (1981), the Board said:

> Although an employer may properly decide that an economic layoff is required, once such a decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.

This principle has recently been revisited in *Porta-King Building Systems v. NLRB*, 14 F.3d 1258 (8th Cir. 1994), enfg. 310 NLRB 539 (1993). There an employer, which had opened a new plant on a nonunion basis, relying on a past practice in effect at its older, unionized plant, laid off five employees without notice to the union, although the union had been recently certified at the new plant. The court observed, using that fact pattern as its context, ''Layoffs are a compulsory subject of bargaining and therefore a unilateral layoff by *Porta-King* violates Section 8(a)(5).'' Also *Warehouse & Office Workers Local 512 v. NLRB*, supra.

With that principle in mind, it takes no great effort to conclude that the instant case is one more in the same line. Here, Respondent told the Union in its April 2 letter that it intended to change the shift system on April 15. Whether or not the Union clearly understood that such an intent meant 79 layoffs (and Waggoner testified that he understood that such a change would mean layoffs), the fact is that these layoffs were begun before Respondent said they would and were of a magnitude much greater than the small, incidental layoffs, which had occurred before (and about which the Union knew nothing). Moreover, even under Respondent's view of the facts, Waggoner had asked on April 4 to return to the bargaining table to discuss the contract. Yet Respondent's Bechard put Waggoner off, saying that a manager critical to negotiations, Soares, would not return until May and Respondent would not negotiate without him. In the face of that, Respondent proceeded with its layoffs, beginning them on April 9. Clearly, Respondent did not, despite its letter, intend to negotiate over the layoff procedures and effects before it was accomplished. Instead, it presented the Union with a classic fait accompli. Moreover, Respondent ''picked and chose'' which employees were to be laid off rather than following some sort of more objective selection procedure. As a result, the Union did not even have the opportunity to discuss the criteria for choosing which employees were to be laid off (and conversely, kept) nor what their recall rights might be.

That the Union might be able to negotiate an acceptable procedure for future layoffs thereafter is, therefore, beside the point. Respondent never gave it even then opportunity to deal with this layoff. Accordingly, I find that this unilateral layoff violated Section 8(a)(5).

Respondent's defense, that the Union somehow waived its right to bargain over these layoffs is unsupported by the facts. It is not necessary to describe the subsequent negotiations on which Respondent relies in supposed proof of that defense. It suffices to say that there is no credible evidence that the Union ever accepted Respondent's proposed management-rights clause. But even if it had, there is even less showing that it would have been accepted retroactively to cover the April 9 (or 15) layoffs. Its proffered defense is inadequate to the task.[7]

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. With respect to this type of case, the Board has prescribed the appropriate affirmative remedy in *Plastonics, Inc.*, 312 NLRB 1045 (1993). Following the teaching of that case, the affirmative remedy shall include an order requiring Respondent to notify the Union before it implements any future layoff and give it an opportunity to bargain over the procedures to be followed in carrying out the layoff and the effects of the layoff on the employees, unless the parties agree to a different procedure in a written collective-bargaining contract. In addition, it shall be directed to make the employees whole for lost pay,

[6] In *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), the Board held that the decision to lay off employees falls within the mandatory bargaining arena. That doctrine has met uncertainty in the courts and the Board has backed away from it. *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146, 147 fn. 3 (1992). In this case, counsel for the General Counsel has specifically disclaimed an intention to allege that the decision to change shifts resulting in a large layoff is a mandatory bargaining subject. Instead, she seeks a finding that Respondent failed to timely notify the Union of the decision and failed to bargain about its effects. Specifically see Tr. 9:19.

[7] Respondent in large part relies on *American Diamond Tool*, 306 NLRB 570 (1992), to support its concept of postevent waiver. It is distinguishable on its facts, for the union there was on notice of the change, chose not to bargain and also proposed a management-rights clause which permitted unilateral layoffs. None of those facts is present here.

with interest for the duration of the layoff. In this regard, the Board said, id.:

> The traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff. *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988). Contrary to the judge, this remedy does not require an antecedent finding that bargaining would have prevented the layoffs. As stated in *Lapeer*,
>
> > First, requiring [such a] finding . . . requires the Board or a court to engage in a post-hoc determination of the economic situation, instead of letting the parties decide themselves at the time of the layoff. This requirement thus unnecessarily injects the Government into an area in which the collective-bargaining process should be permitted to function. Second, the requirement is contrary to our customary policy to order a respondent to restore the status quo when the respondent has taken unlawful unilateral action to the detriment of its employees. The ''consequences of Respondent's disregard of its statutory obligation should be borne by the Respondent, the wrongdoer herein, rather than by the employees.'' *Hamilton Electronics Co*., 203 NLRB 206 (1973).

I recognize that the layoff here is of much longer duration than the one in *Plastonics*, which had a definite term. Even so, the Board seems there to have rejected the lesser remedy, which follows the logic of *Transmarine Navigation Corp*., 170 NLRB 389 (1968). See Chairman Stephens' concurring opinion, where he says he would have chosen such a remedy had the layoff been longer than 2 weeks. The majority chose ''duration of the layoff'' as the proper backpay period. Indeed, that is the traditional remedy for such violations. *Intersystem Design Corp*., 278 NLRB 759 (1986). Guided by that case, I shall order that Respondent make whole the employees laid off on or about April 9, 1996, by paying them their normal wages from the date of their layoffs until the earliest of the following conditions are met: (1) reinstatement of the laid-off employees; (2) mutual agreement as to the manner, method, and effects of the layoffs; (3) good-faith bargaining resulting in a bona fide impasse; (4) the failure of the Union to commence such negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (5) the subsequent failure of the Union to bargain in good faith. Backpay shall be based on the earnings the laid-off employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, I shall include an order requiring Respondent to expunge from its records any reference to the unlawful discharge of those employees and shall require Respondents to notify them in writing that it has done so and that the discharges will not be used against them in any way. *Sterling Sugars*, 261 NLRB 472 (1982).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. In December 1995, acting through John Bechard, Respondent solicited an employee to bring decertification proceedings before the Board, and by such conduct Respondent interfered with, restrained and coerced employees from exercising their Section 7 rights to remain represented by a labor organization as authorized by Section 9(a) of the Act thus violated Section 8(a)(1) of the Act.
4. On March 9, 1996, Respondent, acting through its supervisor and agent Dan Lincoln, interfered with, restrained, and coerced an employee by telling him the rights guaranteed him in Section 7 of the Act, and which were set forth on an official Board poster, were meaningless, simultaneously suggesting that the exercise of those rights would only result in his getting into trouble with Respondent, and thereby violated Section 8(a)(1) of the Act.
5. Beginning on April 9, 1996, Respondent breached the good-faith bargaining obligation of Section 8(a)(5) and Section 8(d) of the Act by unilaterally, and without adequate notice to the Union, laying off 79 employees, thereby depriving the Union of the opportunity to bargain about the procedures to be followed in layoffs, the recall rights of employees who were to be laid off, and the effects such a layoff would have on those employees.

[Recommended Order omitted from publication.]

APPENDIX A

Odebrecht Contractors of California, Inc.
Employees entitled to backpay due to layoffs on or about April 9, 1996

Aboytes, Edward	Badger, Jim
Beckstrom, Jeff	Beruman, Daniel
Bowen, Tomothy	Boyd, Lee
Brogden, Dexter	Brogden, Peter
Campbell, Chris	Carlson, Don
Cedarburg, Dan	Chestnut, Charles
Clark, Richard	Coronel, Elizabeth
Cortez, Javier	Cullin, Kathleen
Cummings, Glenn	Davila, Javier
De La Garrigue, Tom	Fross, Mike
Gardiner, Michelle	Gillen, William
Granados, Chris	Guzman, Martin
Hamilton, Shane	Hampton, Bradley
Hampton, Greg	Hardwick, Mike
Harker, Roberg	Harvey, Brenda
Heristad, Bill	Herrera, Tony
Higgins, Tony	Hobbs, Bill
Holowell, Jeffrey	Holt, Dennis
House, Jimmy	Huizenga, Randy
Jacobs, William	Ketterhange, Peter
Kresin, Jim	Landry, Richard
Lang, Dallas	Lawrence, Robert
Lehr, Tim	Lincoln, Don
Margadonna, Tom	Martin, William
McMakin, John	Morrow, Richard
Nichols, Mike	O'Donnel, Brian

Orosco, Frederick
Osborn, Mark
Peterson, Brian
Reuze, Roy
Santa Anna, Nicholas
Shipman, Kurt
Slinkey, David
Spayd, K.R.
Torres, David
Ortiz, Michael
Pattison, Harry
Ramirez, Thomas
Richardson, David
Shanner,Paul
Simon, Earl
Smith, Rocky
Stankiewica, John
Toscas, Robert
Tougas, Shelley
Vanderpool, Ray
Willinga, James
Weaver, Douglas
Zatina, Daniel
Ubben, Willie
Vick, Tracy
Ward, Roger
Wiekel, William

The beginning of the backpay period varies slightly for each employee. (See G.C. Exh. 2.)